U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0085

MILTON J. BANKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Oct. 30, 2015
	)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (2013-LHC-01315) of Administrative Law Judge Alan L. Bergstrom rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

While he was working for employer on October 13, 2008, metal shavings pierced the skin of claimant's left foot, causing an infection which ultimately resulted in the amputation of his left great toe on October 18, 2008. Claimant continued to have difficulties with his left foot, i.e., pain, swelling and bleeding, which required a second surgical procedure on March 20, 2009. CX 3. Claimant stated that he returned to work

with restrictions after the amputation, as well as following the second surgery, but that continued left foot and knee pain led him to treat with Dr. Stewart beginning in May 2010. HT at 28-30; CX 4. Dr. Stewart diagnosed significant venous insufficiency related to claimant's pre-existing diabetes, and mid-foot arthritis and osteoarthritis of the left knee attributable, in part, to claimant's altered gait as a result of his work injury. CX 4. Dr. Stewart opined that claimant remained capable of performing sedentary work with restrictions up through April 26, 2011. At that time, Dr. Stewart added a restriction of "OPEN SHOES or NO CLOSED TOE SHOES or NO WORK." EX 3 (emphasis in original). He also recommended that claimant undergo a left mid-foot arthrodesis which was scheduled for August 2011, but subsequently canceled due to claimant's other medical conditions.

Claimant stated that employer refused to accommodate the "no closed toe shoes" restriction and instead sent him to GENEX which formulated a vocational rehabilitation plan with the goal of placing claimant "in employment by July 8, 2011."[1] EX 10. Claimant stated, however, that his inability to comply with reporting requirements of the GENEX program prompted employer to remove him from that program and subsequently terminate its payment of voluntary benefits in November 2012.[2] HT at 32-34. Once removed from GENEX, claimant stated that he stopped applying for jobs because his heart condition prevented him from working. HT at 60-61. Employer, meanwhile, obtained a labor market survey from a vocational rehabilitation specialist, Jerry Albert, which identified alternate employment allegedly within claimant's restrictions. EX 12. On August 10, 2012, Dr. Stewart approved five positions for claimant, i.e., two in telemarketing, two in dispatching, and one as a cashier. EX 3. On April 13, 2013, Dr. Stewart testified that claimant had recently been hospitalized, was being treated for cellulitis and congestive heart failure, and, medically, could not work at that time. Claimant sought total disability benefits.

In his Decision and Order, the administrative law judge found that claimant's great left toe injury, as well as his left mid-foot arthritis and left knee osteoarthritis, are related to the October 13, 2008 work injury. Decision and Order at 19-21. The administrative law judge found that claimant established that he is unable to return to his usual work for

[1]GENEX is a company hired by employer to assist in returning its injured employees to full-time work. EX 10.

[2]Employer paid claimant temporary total disability benefits from November 16, 2008 through April 26, 2009, from January 5 through April 12, 2011, and from April 15, 2011 through July 8, 2012, as well as temporary partial disability benefits from July 9 through November 18, 2012, and permanent partial disability benefits under 33 U.S.C. §908(c)(4) for a 17 percent impairment to claimant's left foot. JX 1.

employer as of April 26, 2011, that employer established suitable alternate employment as of July 9, 2012, and that claimant did not diligently search for post-injury employment. *Id.* at 22-24. The administrative law judge also found, based on the parties' stipulation, that claimant reached maximum medical improvement with regard to all of his work-related injuries on January 3, 2013. *Id.* at 25. After finding employer entitled to a credit for all amounts it voluntarily paid claimant, the administrative law judge awarded claimant temporary partial disability benefits for his left great toe injury from July 9, 2012 to January 2, 2013, at the weekly compensation rate of $552.09, and permanent partial disability pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), from January 3, 2013, for a 19 percent loss of use of the left lower extremity.

On appeal, claimant challenges the administrative law judge's denial of total disability benefits. Alternatively, claimant challenges the award of scheduled benefits for a 19 percent loss of use of his left lower extremity. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant first asserts that the administrative law judge erred by admitting the reports of employer's vocational expert, Mr. Albert, without providing claimant the opportunity to cross-examine him to discern the accuracy of the information contained in his reports. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if they are shown to be arbitrary, capricious, or based on an abuse of discretion. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). The administrative law judge is not bound by formal rules of evidence or procedure, 33 U.S.C. §923(a);[3] *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); 20 C.F.R. §702.339, and should admit any evidence that is relevant and material, notwithstanding any contentions regarding the weight to be accorded to such evidence. *See generally Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Specifically, the administrative law judge is to "inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and documents

[3]Section 23(a) of the Act, 33 U.S.C. §923(a), provides in pertinent part that:

> In making an investigation or inquiry or conducting a hearing the [administrative law judge] shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

See also 33 U.S.C. §919(d); 20 C.F.R. §702.339.

which are relevant and material to such matters." 20 C.F.R. §702.338; *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986).

Review of claimant's objections to employer's exhibits, and the administrative law judge's response thereto, establishes that claimant: 1) did not comply with the administrative law judge's pre-hearing instructions for objecting to evidence;[4] but 2) nevertheless, had available, but did not utilize, procedural tools by which he could have directly addressed the flaws he perceived in employer's evidence, i.e., he could have subpoenaed the vocational records or deposed Mr. Albert and/or Dr. Stewart. *See* HT at 9-10. Thus, claimant has not shown that he was denied due process in this case because he had the opportunity to challenge this evidence, *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem*., 202 F.3d 259 (4th Cir. 1999) (table). Further, he has not established that the administrative law judge's evidentiary rulings constitute an abuse of his discretion. *Burley*, 35 BRBS 185; *Cooper*, 33 BRBS 46. Accordingly, we affirm the administrative law judge's admission of employer's exhibits 11-13.[5]

Claimant next contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment. In this respect, claimant avers that Mr. Albert's report contains only a generic statement that the identified jobs "should be within the above individual's physical abilities" and does not reflect whether Mr. Albert was aware of the full requirements of those jobs, claimant's vocational profile, and the entirety of claimant's physical restrictions, including those imposed by Dr. Stewart in September and December 2012. Claimant further contends he is totally disabled because he has been unable to perform any employment due to a combination of his work-related left leg/foot injuries and non-work-related pre-existing conditions. Claimant maintains that Dr. Stewart's opinion, tying the recent complications in his pre-existing conditions to his work injuries, establishes that he is totally incapacitated.

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[4]The administrative law judge explicitly found that claimant's objection did not comply with his Notice of Hearing instructions, which informed the parties that "any objections had to be filed, including authenticity, prior to – within seven days of receipt of the exchange of exhibits." HT 10.

[5]Specifically, Employer's Exhibit 11 is a letter from Mr. Albert dated July 31, 2012, providing the results of his labor market survey, including the identification of five positions he believed claimant was capable of performing. Employer's Exhibit 13 consists of Dr. Stewart's signed approval of the positions identified by Mr. Albert, and Employer's Exhibit 12 is Mr. Albert's August 16, 2012 acknowledgment of the specific jobs "approved by Dr. Stewart on August 10, 2012."

Once, as here, claimant establishes that he is unable to perform his usual employment duties due to his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet its burden of establishing suitable alternate employment on the open market, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing if he diligently tried. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1999); *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT). Employer may rely on a retrospective labor market survey if the jobs identified were available during the "critical period" during which claimant was able to work. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT).

The administrative law judge found that three positions identified by Mr. Albert and approved by Dr. Stewart -- telephone solicitor for Area Circulation, telephone sales with International Marketing Association and 9-1-1 dispatcher with the City of Newport News -- are within claimant's restrictions. Specifically, the administrative law judge found that the telephone solicitor and telephone sales positions "both provided for job training and neither required a high school education, standing or walking." Decision and Order at 24. He thus concluded that these three positions established a range of jobs constituting suitable alternate employment as of July 9, 2012.

We reject claimant's contention that Mr. Albert's report is deficient. Mr. Albert's July 31, 2012 report reflects that he considered a "copious amount of medical records," including those of Dr. Stewart,[6] claimant's vocational and education history, and a June 23, 2011 transferable skills analysis which showed claimant's ability to be employed as a customer service representative, as a receptionist and in security work. EX 11. Mr. Albert further noted that claimant "did not have a driver's license" and that test results reflected "a Verbal Quantitative and Skills composite at the 6th grade level or less." *Id.* Additionally, the administrative law judge explicitly noted the entirety of Dr. Stewart's restrictions, including those the physician added subsequent to the issuance of Mr. Albert's report, Decision and Order at 23, and considered those factors in addressing

[6]In particular, Mr. Albert noted that he considered the "most recent work status" report from Dr. Stewart's office, dated June 27, 2012, which reflected that claimant was generally capable of "modified duties," and more specifically "capable of performing sedentary work with lifting 10 pounds maximum and occasionally carry[ing] small objects," and that "he should seldom stoop or twist," and "never squat, crawl, climb or crouch." EX 11.

whether the jobs identified by Mr. Albert, and approved by Dr. Stewart, constituted suitable alternate employment. *Id.* Moreover, while the administrative law judge did not expressly address the effect of claimant's lack of a driver's license, the record establishes that the administrative law judge was aware of that factor, HT at 43-44; Decision and Order at 10, 18, and that, moreover, it had not previously impeded claimant's ability to perform light-duty work or to attend his appointments with Dr. Stewart. CX 9, Dep. at 22-23. Furthermore, Dr. Stewart stated that "orthopedically I think [claimant] can drive" since "his right foot is okay" and his right "knee has never bothered him enough that he felt like he couldn't drive safely." CX 9, Dep. at 23. Thus, since the record supports the conclusions that claimant's perceived inability to drive is not related to his orthopedic work injuries, and that his lack of a driver's license had not been an impediment to claimant performing post-injury light duty work, we reject claimant's contention that his inability to drive renders him totally disabled. *See generally Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 122 (1998).

We affirm the administrative law judge's finding that the telephone solicitor and telephone sales positions were within claimant's capabilities as of July 9, 2012, and that employer established the availability of suitable alternate employment, as it is supported by substantial evidence.[7] *See Fifer*, 717 F.3d 327, 47 BRBS 25(CRT). The administrative law judge rationally relied on Mr. Alpert's reports and Dr. Stewart's approval of the jobs in finding these two jobs suitable for claimant at the time they were identified. *See Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). We, therefore, affirm the administrative law judge's finding that claimant was entitled to temporary partial disability benefits commencing July 9, 2012.[8]

[7]We, however, note that the 9-1-1 dispatcher job with the City of Newport News requires keyboard skills, which claimant does not possess. EX 13 at 5. Indeed the administrative law judge rejected, in part, the York County 9-1-1 dispatcher job for this reason. Decision and Order at 22-23. Therefore, we reverse the administrative law judge's finding that this job constitutes suitable alternate employment. *See generally Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). As substantial evidence supports the administrative law judge's finding that the two telephone jobs are suitable for claimant, the administrative law judge's error with respect to the dispatcher job is harmless.

[8]Claimant does not appeal the administrative law judge's finding that he did not diligently seek alternate work, or the administrative law judge's finding that his compensation rate for temporary partial disability is $552.09 per week. *See Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). Thus, these findings are affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

We next turn to claimant's contention that, at some point, he became unable to engage in any employment due to the combination of his pre-existing conditions and work-related injuries. If a claimant is unable to perform any work due to his work-related injury, his disability is total. *See Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012). An employer takes its employees as it finds them, *see generally J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967), and is liable for the full extent of a claimant's disability under the aggravation/contribution rule if a claimant's employment-related injury aggravates, exacerbates or combines with a prior condition and results in disability. *See generally Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982). Restrictions from pre-existing conditions should be considered in addressing a claimant's ability to work in alternate employment. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Foundation/Case Foundation v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In this case, claimant's diabetes, obesity and congestive heart failure [CHF] pre-existed his 2008 work injury. EX 1; CX 1. However, as the administrative law judge found, there is no evidence that claimant had any work restrictions attributable to those pre-existing conditions at the time of his October 13, 2008 work injury, or during the time he was capable of performing his light-duty job for employer, i.e., until April 26, 2011, when Dr. Stewart imposed the open-toed shoe requirement. *See* Decision and Order at 23. Moreover, the first discussion of the disabling effects of claimant's pre-existing conditions was on April 18, 2013, when Dr. Stewart was deposed. EX 8. Thus, the administrative law judge was not required to consider the effects of claimant's underlying conditions in determining whether employer initially established suitable alternate employment via Mr. Albert's July 31, 2012 report. *See generally Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011) (pre-existing hearing impairment accounted for in establishing alternate employment).

On April 18, 2013, Dr. Stewart stated that claimant was, at that time, incapable of performing any work because of his recent hospitalization for pulmonary CHF and an ongoing venous stasis condition due to his diabetes.[9] EX 8, Dep. at 27. Claimant

[9]Specifically, Dr. Stewart stated, in response to the question of whether claimant was, given his overall health, currently employable as of the date of the April 18, 2013 deposition, that "right now he's not because he just got out of the hospital and he's being treated for cellulitis and his pulmonary CHF." EX 8, Dep. at 27. Dr. Stewart added that, at present, claimant "barely makes it from the car until he's out of breath," such that "I think right now, medically, I don't think [claimant] is [able to work]." *Id.* However, Dr. Stewart further stated that "if we get his heart and CHF under a little more control, I think he will be [employable] because he has been doing that for quite a while." *Id.*

contends Dr. Stewart tied the worsening of these conditions to the work injury, and that the administrative law judge did not address this evidence. If the work injury contributed medically to the worsening of the conditions that existed prior to the work injury, employer is liable for any disabling consequences and restrictions from those pre-existing conditions are relevant to the issue of suitable alternate employment. *See generally Fishel*, 694 F.2d 327, 15 BRBS 52(CRT); *Collins*, 45 BRBS 79.

When asked whether claimant's pulmonary problems evolved independent of his work-related left foot/leg problems, Dr. Stewart answered, "I think they're related, but to say it's caused, again, I don't know if I could say it's caused." EX 8, Dep. at 29. Dr. Stewart added, "I would say they're related," but that he would "be hard-pressed to say it was caused by that." *Id.* Dr. Stewart similarly indicated, when asked whether there is any correlation between claimant's work-related left foot conditions and his present obesity and related symptoms, that he'd "be hard-pressed to say [the work injuries] caused him" to gain weight, but that "it certainly hasn't helped." *Id.* at 22. As discussed, *supra*, employer is liable if the work-related injury aggravated, exacerbated, or combined with claimant's pre-existing conditions to result in disability. Thus, the work-related injury need not be the sole cause of the disability for employer to bear liability for claimant's entire disability. *See, e.g., Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). Consequently, the administrative law judge did not sufficiently consider this aspect of Dr. Stewart's testimony in stating that he need not consider the restrictions resulting from claimant's CHF and diabetes. We, therefore, vacate the administrative law judge's finding that claimant remained capable of performing suitable alternate employment, and we remand this case for the administrative law judge to determine whether claimant's October 13, 2008 work injury contributed to the worsening of pre-existing CHF and diabetic conditions such that the combination of his work-related and pre-existing conditions have rendered claimant incapable of performing any work. *See generally Macklin*, 46 BRBS 31. If so, then the administrative law judge must determine the date upon which claimant's total disability began.

Claimant further contends the administrative law judge erred by substituting his own medical opinion for that of claimant's treating physician in determining the extent of claimant's impairment for purposes of a schedule award. Claimant avers that, in their post-hearing briefs, both parties contended, based on Dr. Stewart's January 4, 2013 assessment, that claimant sustained a 36 percent impairment to the left lower extremity if the administrative law judge determined that claimant was entitled to a scheduled award of permanent partial disability benefits rather than to an ongoing award of permanent total disability benefits.

In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability under Section 8(c), 33 U.S.C. §908(c), is confined to the schedule in Section 8(c)(1)-(19), 33 U.S.C. §908(c)(1)-(19). *Potomac Electric Power*

Co. v. Director, OWCP, 449 U.S. 268, 14 BRBS 363 (1980). An award under the schedule is based on a claimant's permanent physical impairment and not on economic factors. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011). In a case such as this which does not involve a retiree or hearing loss, the administrative law judge is not bound by any particular standard or formula but may consider medical opinions and observations in addition to claimant's description of symptoms and the physical effects of his injury in assessing the extent of claimant's permanent impairment; as use of the AMA *Guides* is not required at all, it is axiomatic that the most current version need not be utilized.[10] *See, e.g., Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154 (1993).

As claimant correctly states, employer, in its post-hearing brief, conceded that "claimant suffers from a permanent partial impairment of the left lower extremity of 36 % as a result of the left great toe amputation and the left knee disability related to the amputation." Emp. Post-Hearing Br. dated May 15, 2014 at 23.[11] Although the administrative law judge initially acknowledged the parties' identical positions regarding claimant's entitlement to a scheduled award for the 36 percent permanent impairment assessed by Dr. Stewart, *see* Decision and Order at 3-5, he nevertheless engaged in a complex evaluation of claimant's impairment by utilizing the AMA *Guides*, 6th ed., without discussing the parties' apparent agreement on this issue. *Id.* at 25-29. In contrast to that agreement, and to Dr. Stewart's assessment, the administrative law judge independently applied the evidence of claimant's various functional impairments to tables in the Sixth Edition of the AMA *Guides* to conclude that claimant has a left lower extremity impairment of 19 percent.

We agree with claimant that the administrative law judge's award cannot stand. First, the administrative law judge did not provide an explanation for his rejection of the parties' apparent "agreement" that claimant has a 36 percent permanent impairment as assessed by Dr. Stewart. *See generally Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989) (administrative law judge must give the parties notice that he

[10]The Act does not require impairment ratings based on medical opinions using the criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment* except in compensating hearing loss and voluntary retirees with occupational diseases. 33 U.S.C. §§908(c)(13), 908(c)(23), 902(10).

[11]Employer, in its response to claimant's appeal, does not mention its post-hearing concession that claimant is entitled to a scheduled award for the 36 percent impairment assessed by Dr. Stewart. Instead, employer now maintains that the administrative law judge's finding that claimant is entitled to a scheduled award for a 19 percent permanent impairment is rational and supported by substantial evidence.

will reject stipulation). Additionally, in reaching his conclusion, the administrative law judge improperly substituted his judgment for that of Dr. Stewart. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). The administrative law judge informed the parties that he was taking official notice of the Sixth Edition of the AMA *Guides* "during the deliberative process." Decision and Order at 2, 25; HT at 8. It appears, however, that claimant's foot and leg impairments were rated by the medical professionals pursuant to the Fifth Edition of the AMA *Guides*. *See* CX 4 at 58-59; CX 6 at 1; CX 9 at 17-18. The administrative law judge did not inform the parties of his intent to recalculate claimant's impairment rating pursuant to the Sixth Edition, nor is he empowered do to so. Although the administrative law judge is entitled to assess whether the opinions of the medical professionals are supported by the version of the *Guides* they purported to use, *see generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998), the administrative law judge is not, on the facts of this case, entitled to reinterpret the medical findings pursuant to a different version of the *Guides* as he is not a medical expert. *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989); *see generally Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

For these reasons, we must vacate the administrative law judge's award of permanent partial disability benefits for a 19 percent permanent impairment. On remand, the administrative law judge should award claimant benefits for a 36 percent leg impairment as agreed by the parties, or explain why he will not accept the parties' agreed position that claimant has a 36 percent impairment. In the latter event, the administrative law judge may base the award on other evidence of record, or provide the parties the opportunity to cure the perceived defects in the current evidence.

Accordingly, we vacate the administrative law judge's denial of total disability benefits and the permanent partial disability award for a 17 percent leg impairment, and we remand the case for further findings consistent with this decision. In all other respects, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge